Supreme Court, U. S.
FILED
SEP 25 1978
MICHAEL RODAK, JR., CLERK

No. 78-502

In the

Supreme Court of the United States

BRIAN K. FLISK, and BRIAN K. FLISK, RECEIVER,
HOWARD WEITZMAN,
and H.J. COLEMAN COMPANY, INC.,
an Illinois corporation,

Petitioners

vs.

HONORABLE WILLIAM A. KELLY,
Judge of the Circuit Court of Cook County Illinois,
Municipal Division,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF COOK COUNTY ILLINOIS, MUNICIPAL DIVISION

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Of Counsel

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257, Subsection 2:

> The Supreme Court of the United States has declared that the Replevin Statutes of the individual states of the United States require due process when the owner-seller of merchandise attempts to take back his property from a purchaser or a lessee.

The Petitioner seeks an order of court requiring and directing the Circuit Court of Cook County, Illinois, Municipal Division, to abide by the decisions in:

> *Snaidach* v. *Family Finance Corporation* (1969) 395 U.S. 377; 23 L.Ed 2d 349; *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 25 L. Ed 2d 287; *Fuentes* v. *Shevin* (1972) 407 U.S. 67, 32 L. Ed 2nd 556; *Aguilar* v. *Texas*, 389 U.S. 108, 114, 12 L. Ed 2d 723.

It is essential that this court grant Certiorari, in order that the court grant due process, when there is no possibility that the property will be destroyed and the lessee has offered to post a bond for twice the amount of the value of the meters.

It is essential that this Court grant Certiorari due to the conflict of the decisions rendered by this Court in *Fuentes* v. *Shevin* and *Mitchell* v. *Grant Company* (1974) 416 U.S. 600, 40 L. Ed 2d 406, 94 Sup. Ct. 1895.

That in *Fuentes* v. *Sheven* this Court determined that due process must prevail in a replevin proceedings and that

> parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right they must first be notified." 31 L. Ed 2d 569.

This Court further determined that due process did not prevail in the states of Florida and Pennsylvania unless "there was an 'opportunity' for a hearing before the state authorized its agent to seize the property in the possession of a person upon the application of another."

This Court further held that the right to be heard:

> "is to protect his use and possession of property from arbitrary encroachment to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party." 32 L. Ed 2d 570

The decision in *Mitchell* v. *Grant Co.* was rendered in 1974 whereas *Fuentes* v. *Shevin* was rendered in 1972.

THE QUESTIONS ARE SUBSTANTIAL

The transcripts of the hearings before the Respondent more than confirm that the purpose of the use of the writ of replevin was to seize the meters and the writ of replevin was used as a search warrant.

The refusal of the Respondent to issue an order directing the sheriff to return the gas meters concurrently with the posting of money orders twice the value of the meter, and the refusal of the Respondent to direct Peoples Gas Light and Coke Company who had possession of the meters in its "shop" for examination by the States Attorney of Cook County to return the meters concurrently with the posting of the bond, confirms that the "civil writ of replevin" was being used as a search warrant. The use of the writ of replevin was a sham.

That using a writ of replevin as a search warrant is an abuse of the police power of the Respondent since that writ could not have been obtained without probable cause. See *Aguilar* v. *Texas*, 389 U.S. 108, 114, 12 L. Ed 2d 723.

STATEMENT OF THE CASE

The litigation commenced with the filing of writs of replevin.

The attorney for Peoples Gas Light & Coke Company, the Plaintiff in the Replevin suit, presented a motion without notice to the Respondent requesting the issuance of writs of replevin in seven individual cases without consolidation.

The Respondent was requested to hear the proceedings in chambers on the false representation that the defendants upon receiving notice of the legal proceedings to obtain the meters through replevin actions "would destroy the meters."

The Respondent, being very naive in the matter of the construction of gas meters and of the piping, interjected that he had heard of cases where rubber tubing was used to bypass meters. This is a fantastic idea since all of the buildings in these cases are large ones, and the connecting of a one-half inch rubber hose to a 4-inch gas line would blow the party trying to make the connection out of existence. Furthermore, the Respondent "bought" the suggestion of counsel for plaintiff "hook, line and sinker."

A police officer appeared in chambers who said he was assigned to determine if there was meter tampering although he had never been in the basements of any of the buildings. The Sheriff was specifically instructed not to serve the writs prior to the seizure of the meters. The sheriff admitted he did not serve any writs prior to the seizure of the meters and in one instance it was served on a janitor after seizure; in another instance it was left on the corner of a desk with a rental collection agent in a real estate office. However, in those few cases where writs were served it was after the removal of the meters.

An examination of the transcript of the hearing, which is being transmitted concurrently with the Petition, reflects the fantastic presentation presented by the Plaintiffs at the "star chamber proceedings" of the Respondent.

To compound the denial of due process and the Petitioners' rights, the Court entered an order providing the "forcible entry" without a bond. The damage to the premises was substantial in that the doors and locks were broken open making the buildings open to vandalism.

The importance of having this Court grant certiorari is indicated by the misconception of the Respondent on the requirement of due process in a replevin proceeding.[1]

The Fuentes decision of this Court established the unconstitutionality of the state statutes that failed to provide for hearing "at a meaningful time", 32 L.Ed 2d 556, 570:

> "The Florida Replevin Statute granted an opportunity for a hearing after the seizure of the goods; and the Pennsylvania Statute allowed a possible seizure hearing if the aggrieved party initiated one."

The reasoning of this Court in the Fuentes Decision was that:

> "The fair process of decision making (a notice) that it guarantees works by itself to protect against arbitrary deprivation of property . . . it has long been recognized that fairness can rarely be obtained by secret one-sided determination of facts decisive of rights."

---

[1] Notice and service of writ prior to seizure is a mandatory requirement under the Replevin Statute of the State of Illinois.

ARGUMENT

* *

POINT ONE

* *

THE SEQUESTRATION VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT WAS ORDERED EX PARTE WITHOUT PRIOR NOTICE OR WITHOUT OPPORTUNITY FOR A HEARING.

* *

The Case of *Mitchell* v. *W.T. Grant* (1974) 14 U.S. 600, 40 L.Ed 2d 406, 94 Sup. Ct. 1895, is being used and interpreted as a basis for the court justifying eliminating the necessity of the service of writ prior to sequestration when the matter involves only a gas meter.

The state law of Illinois requires the service of a writ upon the defendant prior to sequestration, and the case of *Mitchell* v. *W.T. Grant Company*, ibid, is used as a basis for justification that

> "it was all right to dispense with notice prior to sequestration,"

on the reasoning that Defendant might destroy the gas meter or conceal it prior to sequestration if a notice was served on the defendant.

Based on the foregoing petition and affidavit, which is signed by the attorney for the Peoples Gas Light and Coke Company, the Court not only dispensed with notice but ordered the sequestration of the property without a hearing.

In fact, the Court refused to accept money orders for twice the value of the meters.

In the Mitchell case, the Court asserted that W.T. Grant had reason to believe that the Defendant would

> "encumber, alienate, or otherwise dispose of the merchandise described in the Complaint".

What was true in the Mitchell Case, did not apply to the case at bar.

The Petitioners' basic proposition is that because he had possession of a substantial interest in the sequestered property, due process clause of the Fourteenth Amendment necessarily forbade the seizure without prior notice and an opportunity for a hearing, the lower court held.

In the circumstances, presented here, we cannot agree.

In the Mitchell Case, the court said:

> "Petitioner owned the goods he had purchased under an installment sales contract but his title is heavily encumbered. The seller, W.T. Grant, also had an interest in the property.

The court held that it cannot accept the Petitioner's broad assertion that the due process clause of the United States Constitution guarantees to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed. It is certainly clear under this court's presentation, that issues can be limited in actions for possession.

The case at bar is not on all fours with the Mitchell Case, since in the Mitchell Case, the payment ceases and possession and use by the buyer continues. The seller's interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held.

The buyer is permitted to regain possession by putting up

his own bond to protect the seller. This in the case at bar was denied.

The Court in the Mitchell case held:

"The requirements of due porcess of law are not technical nor is any particular form of procedure necessary. *Inland Empire Council* v. *Mills*, 325, U.S. 697, 710, 89 L. Ed 2d 877, 65 Sup. Ct. 1945."

"The state law provided it with a vendor's lien, to secure the unpaid balance of the purchase price."

This is not a case where the property sequestered by the court is exclusively the property of the Defendant-debtor.

Resolution of the due process question must take into account not only the interest of the buyer of the property but those of the seller as well.

The Louisiana statutes provide for sequestration where one claims the property or right to possession of the property or mortgage lien or privilege thereon if it is within the power of the defendant to conceal, dispose of or waste the property or the revenues therefrom or remove the property from the parish during the pendancy of the action. In the case at bar, Petitioner is only a lessee under contract, by virtue of the Illinois Commerce Act.

The debtor without moving to dissolve the sequestration may also gain possession by filing his own bond to protect the creditor against the interim damage to him should he ultimately win his case and have judgment against the debtor for the unpaid balance of the purchase price which was the object of the suit of the sequestration.

Due process of law guarantees no particular form of procedure. It protects substantial rights. See *NLRB* v *Mackay*, 304 U.S. 333, 351, 82 L.Ed 2d 1381, 58 Sup. Ct. 1938.

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

In the Mitchell Case, the petitioner asserted that its right to a hearing before its possession is in any way disturbed, is nonetheless mandated by a long line of cases in this court culminating in *Snaidach* vs. *Family Finance Corporation*, 397 U.S. 377, 23 L.Ed 2d 349.

The Pre-Snaidach cases are said by the Petitioner to hold that the opportunity to be heard must preceed any actual deprivation of private property. Their import however is not so clear as a petitioner would have it. They merely stand for the proposition that a hearing must be had before one is finally deprived of his property, do not deal at all with the need for a predetermination hearing where a full and immediate post-termination hearing is involved.

In the case at bar, it is an attempt to bypass the Illinois Commerce Commission from which an appeal is taken to the Circuit Court of Cook County. The cases are still pending there and until that procedure is exhausted the Municipal Court of Chicago did not have a right to make a determination.

POINT TWO

* *

THE COURT IS CALLED UPON TO MAKE A DECISION AS TO WHETHER OR NOT TO GRANT CERTIORARI DUE TO THE RULE 107 OF THE SUPREME COURT OF ILLINOIS WHICH SPECIFICALLY PROVIDES THE FORM OF NOTICE TO BE SENT FOR THE ISSUANCE OF A WRIT OF REPLEVIN.

* *

It requires that the notice be sent in the form substantially as that indicated in the form. In 1973 the Illinois Replevin Act, Chapter 119, was amended to provide for notice and hearing prior to the issuance of the writ of replevin in conformity to the decision of the U.S. Supreme Court in *Fuentes* v. *Shevin* 407 U.S. 67, Section 4(a) of the Statute as amended provide a five-day notice of a hearing on the question of the issuance of a writ of replevin be given in the manner required by Rule of the Supreme Court, Rule 107.

The theory that the gas meter could be destroyed is a fantastic belief because the plaintiff could do nothing with the meter. The meters are old and were not installed in the first place immediately following their manufacture. Some of the meters vary in age up to thirty-five years.

The Judge who is the Respondent in this matter is either naive or has no acquaintance with gas meters when he said that there was a possibility and acquiesced to the waiver of notice prior to sequestration.

Seventy-five years ago, the Court held in *Boyd* vs. *United States*, 116 U.S. 616, 630, 29 L.Ed. 746, 6 Sup. Ct. 524, that considering the Fourth and Fifth Amendments as running "almost into each other" and the facts before the Supreme Court, the Supreme Court held that the doctrine of those Amendments applies to all invasions and its employs of the sanctity of a man's home and the privacies of life. It is not

the breaking of his doors and the rumaging of his drawers that constitutes the essence of the offense, but it is the invasion of his indefeasible rights of personal security, personal liberty and private property.

The court went on to say:

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation but any forcible and compulsory extortion of a man's own testimony or of his private papers, to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of those amendments."

Less than thirty years after Boyd, the Court, (1914) in *Weeks* vs. *The United States*, 332 U.S. 383, 532, 34 S. Ct. 341 stated:

> "That the Fourth Amendment put the Courts of the United States and the federal officials in the exercise of their power and authority under limitations and restraints and forever secured the people, their persons, houses, papers and effects against all unreasonable searches or seizures under guise of law, and duty of giving to it force and effect as obligatory upon all entrusted under our federal system with the enforcement of the laws."

Specifically dealing with the evidence unconstitutionally seized, the Court concluded:

> "If letters and private documents can thus be seized and held in evidence against a citizen accused of an offense the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might well be stricken from the Constitution. The efforts of the Courts and of officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Finally the Court stated:

"That the use of the seized evidence involved the denial of the constitutional rights of the accused."

There was no basis for seizing the meters, since the matter was pending before the Circuit Court of Cook County, and until that court decided the question on appeal from the Commission's ruling, the Circuit Court, Municipal Division, was restrained, even though a restraining order was not specifically issued, from taking any action.

There is no question that the Replevin Proceedings was used as a search warrant.

POINT THREE

* *

NOTICE TO THE DEFENDANT IS REQUIRED UNDER SECTION 4(a) OF THE REPLEVIN ACT OF THE STATE OF ILLINOIS.

* *

The Replevin Act, Chapter 119, Section 4(a) of Illinois Revised Statutes, Smith-Hurd Edition, reads:

"The defendant shall be given five days notice in the manner required by rule of the Supreme Court, of a hearing before the court to contest the issuance of a writ of replevin;

"No writ of replevin may issue nor may property be seized pursuant to a writ of replevin, prior to such notice and hearing such as provided in Section 4(b);

"As to any particular property, the right to notice and hearing may not be waived by any consumer."

As used in this section, the consumer is an individual who obtains possession of properties for personal, family, household or agricultural purposes. Any waiver of the right to notice and hearing established must be in writing. The consumer cannot waive his right to notice and hearing prior to the sale; in this instance, the consumer is a bailee and not a purchaser.

Respondent in this instance listened to Plaintiff's counsel, that is the Counsel for Peoples Gas Light & Coke Company, say that he feared that the property would be destroyed, and therefore attempted to justify a seizure without notice.

This is a flimsy excuse to seize the property, whereas the Mitchell case, ibid, held:

"Due process of law guarantees no particular form of procedure and protects substantial rights."

What are the rights of a person who is relegated to the Utility Act? If he has a complaint, he must go before the Commerce Commission. If he is not satisfied, he appeals to the Circuit Court.

This is not a case where the Petitioner is deprived of his property. This is a case where, in some instances, forty people in one building were deprived of water, heat and cooking gas, all on the theory that the Mitchell Case authorized the sequestration without a hearing prior to a seizure.

In the case at bar, it is important that the Court finally address itself as to whether or not a hearing is necessary prior to sequestration when plaintiff will admit that the property is not that of the petitioner, it belongs to the Peoples Gas Light and Coke Company which has a franchise.

That, due to the franchise, Peoples Gas Light & Coke Company has a monopoly and Petitioner is relegated to using only the Peoples Gas Light & Coke Company for supplying its heat, for hot water and for cooking gas.

Petitioner asserts that his right to a hearing before his possession is in any way disturbed, nonetheless is mandated by a long line of cases in this court, culminating in *Snaidach* vs. *Family Finance Corporation*, ibid, 1969, and *Fuentes* v. *Shevin*, ibid, 1972.

The pre-Snaidach cases are said by Petitioner to hold that the opportunity to be heard must preceed any actual deprivation of private property.

This is especially true where the property is that of the Gas Company and the court cannot equate that the same level where a person buys property on the installment plan and is unable to pay for the property

The fact that there is ultimate determination, as the court mentioned in the Mitchell Case, ibid, is not necessarily a protection to the Petitioner. In *Snaidach* v. *Family Finance Corp.* it said that

". . . MacKay and like cases dealt with a procedural rule that may satisfy due process for attachments in general, but one would not necessarily satisfy procedural due process in every case."

One that gives necessary protection to all property in its modern forms.

In the Snaidach Case, the court also observed that:

"That garnishment was subject to abuse by creditors without valid claims, a risk minimized the nature of the security interest there at stake and the protection to the debtor offered by Louisiana procedure."

The court specifically held:

"Because carried out without notice or opportunity for hearing, and without judicial participation, this kind of seizure was held violative of due process clause, *Snaidach* v. *Family Finance Corp.*", ibid.

Judge Powell concurred with the opinion rendered by Justice White in the Mitchell Case. However, Justice Powell said that:

"The constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessary interest in tangible personal property."

In the instant case it is not a possessary interest; it is the right to use the gas meter until the courts had decided whether or not the Commerce Commission was correct. The petitioner is only a lessee or a bailee.

Before the Illinois Commerce Commission, Petitioner requested that applications for subpoenas be approved, requiring the production of documents such as the premise record, the computer record and all other records that the respondent was using to compute its bills.

These were denied.

The question that is now before this court is whether it is essential that the court grant certiorari in order that due process may be obtained when there is no possibility that the property will be destroyed and the state statute requires a notice and hearing prior to sequestration.

The petitioners have come to court with money orders twice the value of the cost of the meters and have offered to post these checks with the court, which was refused.

Secondly, the sheriff did not have the meter in his possession; neither did the gas company. The meters were in the hands of the States Attorney for investigatory purposes.

From this it is quite obvious that the purpose of seizing the meters and the use of the Replevin Act was a subterfuge for the use of a search warrant.

This should not be permitted.

If the decision of this Court in: *Mapp* vs. *Ohio* (1961) 367 U.S. 643, 6 L.Ed. 2d 1081, 81 U.S. 1684, is still good law, then

> "as a matter of due process, evidence obtained by a search and seizure in violation of the 14th Amendment is inadmissible, in a state court as it is in a federal court."

Then this court should order the meters returned to the petitioners upon the posting of the bond for lack of due process.

The opinion of this Court in *Mapp* v. *Ohio*, ibid, ends with the following quotation:

> The ignoble shortcut to conviction left open to the State tends to destroy the entire system of "constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice." 6 L Ed 2d 1093.

CONCLUSION

This Court is required to grant certiorari as the case of *Mitchell* v. *Grant*, ibid, is being misinterpreted. That replevin is being used for sequestration without a hearing resulting in violation of due process which is guaranteed to every individual.

Replevin is being used in place of a search warrant.

No proceedings is presently pending by the States Attorney of Cook County, or any other criminal proceedings involving the meters that were sequestered.

As has been called to the attention of this Court, if *Mapp* v. *Ohio* is good law, then the Court should eliminate any possibility that *Mitchell* v. *Grant* authorizes the seizure carte blanche not of merchandise, but of a gas meter, which obviously cannot be destroyed and there would be no point in destroying it.

The Court is required to emphasize in its opinion that a replevin suit cannot be used in place of a search warrant.

Respectfully submitted,

WILLIAM HENNING RUBIN
Counsel for
Petitioners

LAW OFFICES OF:

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60602
263-6780

APPENDIX

June 28, 1978

Mr. William Henning Rubin
Attorney at Law
188 W. Randolph
Suite 714
Chicago, IL 60601

In re: Brian K. Flisk, et al., etc., petitioners, vs. Honorable William A. Kelly, Judge of the Circuit Court of Cook County, Municipal Division, respondent. No. 50816.

Dear Mr. Rubin:

The Supreme Court today made the following announcement concerning the above entitled cause:

The motion by petitioners for leave to file instanter a supplemental memorandum of law and certain transcripts in support of petition for mandamus is allowed.

The motion by petitioners for leave to file a petition for an original writ of mandamus and for further relief is denied.

Very truly yours,

Clerk of the Supreme Court
Springfield, Illinois

CLW:jae

App. 2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Municipal DEPARTMENT First

(COUNTY) (MUNICIPAL) (DIVISION) (DISTRICT)

Peoples Gas Light & Coke Co.
Plaintiff
v.
BRIAN FLISK
HOWARD WEITZMAN
H.J. COLEMAN CO.
ESTATE OF C. SPADE
Defendants

78M1-290379
78M1-290380
No. 78M1-290381
78M1-290382
78M1-290383
78M1-290384

ORDER

This cause coming on for hearing on the Motions of the Defendants in all of the above matters pending before this Court and the Court having jurisdiction of the parties and subject matter and being fully advised in the premises and having heard testimony and argument of counsel,

IT IS ORDERED:

1.) That the matters above set forth are heard together for the convenience of the parties and of the Court. That Attorney William Rubin is given leave to appear on behalf of all the defendants and shall file his appearance on their behalf in the respective cases.

2.) That the Motion of the Defendants filed in each cause for emergency relief from the issuance of the Writ of Replevin is denied.

3.) That the oral motion of the Defendants for an Order upon the Sheriff of Cook County to accept the forthcoming bond of the defendants in the above cause is denied.

May 24 , 19 78

Name Wexler, Wexler and Heller, Ltd.
Attorney for Plaintiff
Address 134 N. LaSalle Street
City Chicago, Illinois 60602
Telephone 236-3644

ENTER:

.....
Judge

App. 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Municipal DEPARTMENT First

(COUNTY) (MUNICIPAL) (DIVISION) (DISTRICT)

Peoples Gas Light & Coke Co.
Plaintiff
v.
BRIAN K. FLISK &
H.J. COLEMAN CO.
Defendants

No. 78M1-290380

ORDER

This cause coming on for hearing on the Motion to Dismiss the Replevin Proceeding and other Relief filed by the Defendant, and the Court having jurisdiction of the parties and of the subject matter and the court having heard the testimony of witnesses and the arguement of counsel, and otherwise being fully advised in the premises:

IT IS ORDERED:

1.) That the written motion for an order upon the Sheriff of Cook County, Illinois to accept the forthcoming bond offered by the defendant is denied and the order of May 24, 1978 denying the same shall stand in full force and effect.

2.) That the profer of checks to the court in payment of the forthcoming bond is refused, and the same checks offered as exhibits shall not be admitted as evidence in the record of this cause.

3.) That the Motion to Strike the Motion to Dismiss the Replevin Proceeding filed by the Plaintiff is hereby denied.

4.) That the Motion to Dismiss the Replevin Proceeding filed by the defendant herein is hereby denied.

5.) That all other relief prayed for in the Motion to Dismiss the Replevin Proceeding filed by the defendant is specifically denied.

6.) That the trial of this cause is set for June 19, 1978 at 11:00AM in this cause as previously set before this court in room 1401 of the Richard J. Daley Center Building.

May 31 , 19 78

Name Wexler, Wexler and Heller, Ltd.
Attorney for Plaintiff
Address 134 N. LaSalle Street
City Chicago, Illinois 60602
Telephone 236-3644

ENTER:

.....
Judge

App. 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Municipal (COUNTY) (MUNICIPAL) DEPARTMENT First (DIVISION) (DISTRICT)

Peoples Gas Light & Coke Co.
Plaintiff
v.
BRIAN K. FLISK, receiver

No. 78M1-290381

ORDER

This cause coming on for hearing on the Motion to Dismiss the Replevin Proceeding and other Relief filed by the Defendant, and the Court having jurisdiction of the parties and of the subject matter and the court having heard the testimony of witnesses and the arguement of counsel, and otherwise being fully advised in the premises:

IT IS ORDERED:

1.) That the written motion for an order upon the Sheriff of Cook County, Illinois to accept the forthcoming bond offered by the defendant is denied and the order of May 24, 1978 denying the same shall stand in full force and effect.

2.) That the profer of checks to the court in payment of the forthcoming bond is refused, and the same checks offered as exhibits shall not be admitted as evidence in the record of this cause.

3.) That the Motion to Strike the Motion to Dismiss the Replevin Proceeding filed by the Plaintiff is hereby denied.

4.) That the Motion to Dismiss the Replevin Proceeding filed by the defendant herein is hereby denied.

5.) That all other relief prayed for in the Motion to Dismiss the Replevin Proceeding filed by the defendant is specifically denied.

6.) That the trial of this cause is set for June 19, 1978 at 11:00AM in this cause as previously set before this court in room 1401 of the Richard J. Daley Center Building.

May 31 , 19 78

Name Wexler, Wexler and Heller, Ltd.
Attorney for Plaintiff
Address 134 N. LaSalle Street
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ENTER:

Judge

App. 5

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Municipal (COUNTY) (MUNICIPAL) DEPARTMENT First (DIVISION) (DISTRICT)

Peoples Gas Light & Coke Co.
Plaintiff
v.
BRIAN K. FLISK
Defendant

No. 78M1-290382

ORDER

This cause coming on for hearing on the Motion to Dismiss the Replevin Proceeding and other Relief filed by the Defendant, and the Court having jurisdiction of the parties and of the subject matter and the court having heard the testimony of witnesses and the arguement of counsel, and otherwise being fully advised in the premises:

IT IS ORDERED:

1.) That the written motion for an order upon the Sheriff of Cook County, Illinois to accept the forthcoming bond offered by the defendant is denied and the order of May 24, 1978 denying the same shall stand in full force and effect.

2.) That the profer of checks to the court in payment of the forthcoming bond is refused, and the same checks offered as exhibits shall not be admitted as evidence in the record of this cause.

3.) That the Motion to Strike the Motion to Dismiss the Replevin Proceeding filed by the Plaintiff is hereby denied.

4.) That the Motion to Dismiss the Replevin Proceeding filed by the defendant herein is hereby denied.

5.) That all other relief prayed for in the Motion to Dismiss the Replevin Proceeding filed by the defendant is specifically denied.

6.) That the trial of this cause is set for June 19, 1978 at 11:00AM in this cause as previously set before this court in room 1401 of the Richard J. Daley Center Building.

May 31 , 19 78

Name Wexler, Wexler and Heller, Ltd.
Attorney for Plaintiff
Address 134 N. LaSalle Street
City Chicago, Illinois 60602
Telephone 236-3644

ENTER:

Judge

App. 6

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Municipal (COUNTY) (MUNICIPAL) DEPARTMENT First (DIVISION) (DISTRICT)

Peoples Gas Light & Coke Co.
Plaintiff
v.
BRIAN K. FLISK &
ESTATE OF C. SPADE
Defendants

No. 78M1-290384

ORDER

This cause coming on for hearing on the Motion to Dismiss the Replevin Proceeding and other Relief filed by the Defendant, and the Court having jurisdiction of the parties and of the subject matter and the court having heard the testimony of witnesses and the arguement of counsel, and otherwise being fully advised in the premises:

IT IS ORDERED:

1.) That the written motion for an order upon the Sheriff of Cook County, Illinois to accept the forthcoming bond offered by the defendant is denied and the order of May 24, 1978 denying the same shall stand in full force and effect.

2.) That the profer of checks to the court in payment of the forthcoming bond is refused, and the same checks offered as exhibits shall not be admitted as evidence in the record of this cause.

3.) That the Motion to Strike the Motion to Dismiss the Replevin Proceeding filed by the Plaintiff is hereby denied.

4.) That the Motion to Dismiss the Replevin Proceeding filed by the defendant herein is hereby denied.

5.) That all other relief prayed for in the Motion to Dismiss the Replevin Proceeding filed by the defendant is specifically denied.

6.) That the trial of this cause is set for June 19, 1978 at 11:00AM in this cause as previously set before this court in room 1401 of the Richard J. Daley Center Building.

May 31 , 19 78

Name Wexler, Wexler and Heller, Ltd.
Attorney for Plaintiff
Address 134 N. LaSalle Street
City Chicago, Illinois 60602
Telephone 236-3644

ENTER:

.....
Judge

App. 7

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Municipal (COUNTY) (MUNICIPAL) DEPARTMENT First (DIVISION) (DISTRICT)

Peoples Gas Light & Coke Co.
Plaintiff
v.
HOWARD WEITZMAN
Defendant

No. 78M1-290379

ORDER

This cause coming on for hearing on the Motion to Dismiss the Replevin Proceeding and other Relief filed by the Defendant, and the Court having jurisdiction of the parties and of the subject matter and the court having heard the testimony of witnesses and the arguement of counsel, and otherwise being fully advised in the premises:

IT IS ORDERED:

1.) That the written motion for an order upon the Sheriff of Cook County, Illinois to accept the forthcoming bond offered by the defendant is denied and the order of May 24, 1978 denying the same shall stand in full force and effect.

2.) That the profer of checks to the court in payment of the forthcoming bond is refused, and the same checks offered as exhibits shall not be admitted as evidence in the record of this cause.

3.) That the Motion to Strike the Motion to Dismiss the Replevin Proceeding filed by the Plaintiff is hereby denied.

4.) That the Motion to Dismiss the Replevin Proceeding filed by the defendant herein is hereby denied.

5.) That all other relief prayed for in the Motion to Dismiss the Replevin Proceeding filed by the defendant is specifically denied.

6.) That the trial of this cause is set for June 19, 1978 at 11:00AM in this cause as previously set before this court in room 1401 of the Richard J. Daley Center Building.

May 31 , 19 78

Name Wexler, Wexler and Heller, Ltd.
Attorney for Plaintiff
Address 134 N. LaSalle Street
City Chicago, Illinois 60602
Telephone 236-3644

ENTER:

.....
Judge

78-502
FILED
SEP 25 1978

No.

In the

Supreme Court of the United States

BRIAN K. FLISK, et al,

Petitioners

vs.

HONORABLE WILLIAM A. KELLY, Judge of the Circuit Court of Cook County, Municipal Division

Respondent

APPENDIX PETITION FOR CERTIORARI

WILLIAM H. RUBIN
188 W. Randolph
Chicago, Illinois 60601
ATTORNEY FOR PETITIONERS

William Henning Rubin
Of Counsel

In The

SUPREME COURT OF THE UNITED STATES

BRIAN K. FLISK, et al, *Petitioners* vs. HONORABLE WILLIAM A. KELLY, Judge of the Circuit Court of Cook County, Municipal Division *Respondent*	PETITION FOR WRIT OF MANDAMUS In Circuit Court of Cook County Illinois Municipal Division cases Numbers 78 M1-290379 to and including 78 M1-290384

MOTION FOR LEAVE TO FILE INSTANTER PETITION FOR WRIT OF MANDAMUS.

NOW COMES PETITIONERS BRIAN K. FLISK, et al, and moves this Court for leave to file instanter the Petition for Writ of Mandamus.

That in support thereof, Petitioners say as follows:

1. That this is an emergency matter since the buildings have been deprived of hot water and in one of the buildings it has been deprived of cooking gas as the result of the illegal seizure of the meters using the writ of replevin a civil procedure on the pretense of it being an emergency to stop a criminal act.

2. That the writ was issued without notice, and without the service of a writ pursuant to a court order of the Respondent who also authorized the forceful breaking into the basements for the removal of the meters in a high crime area.

3. That the Petitioners have been deprived of civil rights, acting under color of law, an unlawful arrest, and seizure, as set forth in 42 U.S.C. Sections 1981, 1982, 1983 and 1984.

That the Supreme Court of the United States today, pursuant to the opinion rendered by Justice William Brennan determined that actions may be brought against "local governments, local officials in their official capacities, when the civil rights of citizens have been violated."

That as set forth in the Memorandum of Law hereto attached, Respondent has violated and ignored the principles of due process in permitting a star chamber proceedings without notice and without the service of the writs of replevin prior to the taking of the property.

That such unwarranted conduct is an abuse of judicial process which has been frowned upon by this Court as well as the Supreme Court of the United States.

WHEREFORE, Petitioners move that leave be given to file instanter the Petition for Mandamus against the Respondent and that a writ be issued forthwith granting relief as prayed for in the Petition for Mandamus.

PETITIONERS FURTHER MOVE THAT They may have such further relief as the court may deem proper.

BRIAN K. FLISK, et al,
Petitioners

/s/ By WILLIAM HENNING RUBIN
William Henning Rubin
Their attorney

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60601
263-6780

AFFIDAVIT

WILLIAM HENNING RUBIN on oath deposes and says

1. That he has read the aforegoing Motion and

2. That the statements made therein are true in substance and in fact.

AFFIANT FURTHER SAITH NAUGHT.

/s/ WILLIAM HENNING RUBIN
William Henning Rubin

SUBSCRIBED AND SWORN TO
before me this 7th day
of June, 1978.

_____
Notary Public

TO THE SUPREME COURT OF ILLINOIS

BRIAN K. FLISK, and BRIAN K. FLISK, RECEIVER HOWARD WEITZMAN, and H.J. COLEMAN and COMPANY, INC., an Illinois corp., *Petitioners* vs. HONORABLE WILLIAM A. KELLY, Judge of the Circuit Court of Cook County, Municipal Division *Respondent*	PETITION FOR WRIT OF MANDAMUS FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, MUNICIPAL DIVISION, IN CASE NUMBERS, 78 M1-290379 78 M1-290380 78 M1-290381 78 M1-290382 78 M1-290383 and 78 M1-290384

THE PETITIONERS, BRIAN K. FLISK, BRIAN K. FLISK, Receiver, HOWARD WEITZMAN, and H.J. COLEMAN AND COMPANY, INC., an Illinois corporation, are and at all times mentioned herein were residents of the City of Chicago, County of Cook, State of Illinois.

2. THE RESPONDENT, the HONORABLE WILLIAM A. KELLY, is and at all times mentioned herein was the Judge of the Circuit Court of Cook County, Illinois, Municipal Division.

3. THAT PEOPLES GAS LIGHT AND COKE COMPANY is the Plaintiff in the cases entitled:

PEOPLES GAS LIGHT & COKE COMPANY vs. BRIAN FISK, Defendant, in the Circuit Court of Cook County,

Municipal Division, Case Numbered 78n M1-290379;
PEOPLES GAS LIGHT & COKE COMPANY, vs. HOWARD WEITZMAN, Defendant in the Circuit Court of Cook County, Municipal Division Number 78 M1-290380;
PEOPLES GAS LIGHT & COKE COMPANY, vs. BRIAN FLISK, RECEIVER, Defendant in the Circuit Court of Cook County, Municipal Division, Case Numbered 78 M1-290381;
PEOPLES GAS LIGHT & COKE COMPANY, vs. H.J. COLEMAN AND COMPANY, INC., an Illinois corporation, Defendant in the Circuit Court of Cook County, Illinois 78 M1-290382;
PEOPLES GAS LIGHT & COKE COMPANY vs. HOWARD WEITZMAN[Defendant in the Circuit Court of Cook County, Illinois case Number 78 M1-290383; and
PEOPLES GAS LIGHT & COKE COMPANY vs. BRIAN K. FLISK, Defendant in the Circuit Court of Cook County, Illinois, Case Number 78 M1-290384.

4. THAT RESPONDENT THE HONORABLE WILLIAM A. KELLY, is and at all times mentioned herein was the Judge of the Circuit Court of Cook County, Illinois, Municipal Division.

5. That Peoples Gas Light & Coke Company instituted the above mentioned cases in the Circuit Court of Cook County, Municipal Division, for the issuance of a Writ of Replevin against Petitioners for the seizure of various gas meters.

6. That a Motion was filed before Respondent the Honorable William A. Kelly and on the 16th day of May, 1978 an ex parte hearing without notice to the Petitioners was held in the chambers of the Honorable William A. Kelly.

7. That a copy of said motions is hereto attached and made a part of this proceedings as Petitioners' Group Exhibit A, together with the Petitions for Writ of Replevin.

8. That the Respondent contrary to the provisions of the Replevin Act of the State of Illinois permitted employees of the Gas Company to give false testimony that Petitioners would not

make arrangements for the employees of Peoples Gas Light & Coke Company to have access to the premises to read the gas meters, examine the piping and to remove the gas meters for nonpayment of bills.

9. That the employees of Peoples Gas Light & Coke Company falsely stated that they had not read the meters whereas the Petitioners filed a motion to dismiss and offered oral testimony at a subsequent hearing after the meters had been removed, that the Gas Company employees had been reading the meters regularly in accordance with an established plan on the second Tuesday of each month for the meters located on the South Side of the City of Chicago, and the third Tuesday of the month on the West Side of the City of Chicago.

10. That Peoples Gas Light & Coke Company, the Plaintiffs, further failed to advise, and concealed the fact that all of the meters had been replaced within the period of a year.

11. That Plaintiffs Peoples Gas Light & Coke Company distorted the rules of the Commerce Commission and their attorney posed the question:

> "Is it not a Commerce Commission ruling and a policy of the Gas Company that meters be exchanged or switched periodically for the safety of the customers?" (Transcript of the Hearing held May 16, 1978, p. 14.)

12. That that statement is taken out of context and did not apply at all to any of the meters in question.

13. That Plaintiff Peoples Gas Light & Coke Company and its attorney failed to inform the Court that cases had been instituted before the Illinois Commerce Commission and that the decision of the Commission was on appeal to the Circuit Court of Cook County in the following cases: 77 L 12111; 77L 14067; 77L 17441; and 77L 24563.

14. That copies of each of the Complaints are attached hereto and incorporated and made a part of this Petition for Mandamus as Petitioners' Group Exhibit A.

15. PEOPLES GAS LIGHT & COKE COMPANY "wove a fabrication" before the Honorable WILLIAM A. KELLY that the meters were being removed on the suspicion of being tampered with,

16. That the Honorable William A. Kelly, being completely naive concerning the operations of gas meters interjected:

> "Is it a fact that a tampered meter is really a risk?"

and the witness, Anthony DeLuccio, an employee of the Gas Company with the title: Accounts Representative, answered:

> "Obviously it would be done by unauthorized persons . . . myself, based on my experience, I would say it is a dangerous condition."

The Court, being further naive, suggested:

> "Isn't it true there have been several instances of meters being bypassed with rubber hoses?"
> (Transcript Page 15).

And the witness answered:

> "Yes, that is correct."

17. That the witness, Anthony DeLuccio, was not a qualified person such as a licensed plumber of pipefitter or even in the terms of the Gas Company's employees[1] or a meter reader who had visited the basements of any of the buildings within the last sixty (60) days and capable of giving any testimony that there was evidence of meter tampering.

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[1] Previous testimony before the Illinois Commerce Commission in many of the hearings disclosed that the Gas Company does not use licensed plumbers or steam fitters and uses common laborers to install or remove gas meters. These are known in the plumbers' trade as "wrench jockeys" since their training in this regard is merely in the use of a wrench.

18. That the Petitioners Counsel filed a Motion to Dismiss the Replevin Proceedings and that the Sheriff or the Peoples Gas Light & Coke Company (depending on who had possession of the meter) return the seized property illegally taken under the subterfuge of a replevin suit. Petitioners tendered in open court money orders twice the amount of the value of each meter which was set forth in each of the writs of replevin (the writs of replevin were served on the Defendants subsequent to the removal of the meters):

19. That pursuant to the false testimony designed specifically to make the Order of the Court for the seizure of the meters without notice and without the service of the Writs of Replevin on the various Petitioners-Defendants, to seem apparently legal, the Court issued an Order providing for forcible entry and seizure of the meters without notice and without bond for damage to Defendants' property as the result of the forced entry.

20. That the Motion of Petitioners to dismiss the Proceedings and return the seized property upon the posting of a bond or cash deposit pursuant to the provisions of the Replevin Act, was denied.

21. That the Order denying the dismissal and denying leave to the Petitioners to deposit with the Sheriff the money orders for twice the value of the meters, also provided that the money orders made payable to the Sheriff of Cook County covering amounts twice the value of each meter as represented in the writs of replevin, "are not to be admitted into evidence." Copies of the said money orders made payable to the Sheriff of Cook County that were tendered to the Court are attached hereto as Group Exhibit B, and incorporated and made a part of this Petition for Mandamus.

22. That this Petition for Mandamus questions the correctness of the rules of the Respondent: and the Petitioners assert that the

orders[1] of the Respondent attached hereto as Exhibit C, denying Petitioners Motion to Dismiss the Replevin Proceedings and further denying Petitioners their right to post a bond or cash deposit in accordance with the Replevin Statute, is in conflict with certain decisions of the Supreme Court of the United States. These decisions are: *Snaidach v. Family Finance Corporation* (1969) 395 U.S.337; 23 L.Ed 2d 349; *Goldberg v. Kelly* (1970) 397 U.S. 254, 25 L.Ed.2d.287; *Fuentes v. Shevin* (1972) 407 U.S. 67, 32 L.Ed.2d 556.

23. *All of those cases established the principal that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right they must first be notified. Baldwin v. Hale* 68 U.S.223,233.

24. The cases also establish the principal "It is equally fundamental that the right to notice and an opportunity to be heard *must be granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62.

25. That in further support of this Petition for Mandamus Petitioners Counsel attaches a Memorandum of Law to support their contention that the seizure without notice was illegal.

26. That the obvious purpose as set forth in the Motion of Counsel for Peoples Gas Light and Coke Company, and the testimony offered in open court, was that the replevins were filed for the purpose of turning over the meters to the States Attorney of Cook County. This, if it were true, would be completely illegal as an attempt to use a legal writ to secure evidence for a criminal act.

27. That there was no evidence of any criminal act offered before the Court, and the Respondent naievely accepted statements of Counsel and persons who had no personal

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[1] A separate order was entered by Respondent in each of the aforementioned cases, the language of each order being exactly the same.

knowledge of the existence of any illegal acts nor were they qualified to make an examination if there were any illegal acts being conducted in the basements of the various properties.

28. That the Peoples Gas Company's Counsel produced a police officer to state that he was assigned to check for meter tampering, but who admited that he had never been in the basements.

29. That Brian Flisk was appointed as Receiver in the case entitled: *Randolph Mortgage Corp., an Illinois corporation, vs. John C. Cruzat,* in the Circuit Court of Cook County, Chancery Division, in case numbered

30. That the entering of an order of court against a receiver by the Respondent without notice and the removal of replevin property is a contemptuous act since the Circuit Court of Cook County Chancery Division has paramount jurisdiction over the Municipal Court of Chicago.

31. That it is a further contemptuous act to interfere with the acts of any receiver appointed pursuant to an order of court, without leave of court.

WHEREFORE, PETITIONERS PRAY That this Court issue a WRIT OF MANDAMUS directing the Respondent to order the return of the gas meters to the Petitioners upon the deposit with the Sheriff of Cook County of a bond or cash or certified check twice the amount of the value of the meters as set forth in the writs of replevin.

PETITIONERS FURTHER PRAY That the trial court certify the questions of law to the Appellate Court of Illinois First District, for determination concerning the legality of the seizure of the gas meters without notice and without an opportunity to be heard prior to the seizure.

PETITIONERS FURTHER PRAY That they may have such further relief as the Court may deem proper.

BRIAN K. FLISK, and
BRIAN K. FLISK, RECEIVER,
HOWARD WEITZMAN, and
H.J. COLEMAN & COMPANY, INC.,
an Illinois corporation,
PETITIONERS

/s/ By WILLIAM HENNING RUBIN
William Henning Rubin
Their Attorney

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60601
263-6780

AFFIDAVIT

BRIAN K. FLISK being on oath duly sworn deposes and says that:

1. He personally was never served any notice of writ of replevin or writ of replevin in his capacity as an individual or in any other capacity as a Receiver.

2. That he has read the aforegoing petition for mandamus and the statements made therein are true in substance and in fact.

AFFIANT FURTHER SAITH NAUGHT.

/s/ BRIAN K. FLISK
Brian K. Flisk

SUBSCRIBED AND SWORN TO
BEFORE ME THIS _____ day
of June, 1978.

_____
Notary Public

AFFIDAVIT

HOWARD WEITZMAN, being on oath duly sworn, deposes and says that:

1. He personally was never served any Notice of Writ of Replevin, or Writ of Replevin; prior to removal of meters.

2. That he has read the aforegoing petition for mandamus and the statements made therein are true in substance and in fact.

AFFIANT FURTHER SAITH NAUGHT.

/s/ HOWARD WEITZMAN
Howard Weitzman

SUBSCRIBED AND SWORN TO
before me this _____ day
of June, 1978.

_____
Notary Public

AFFIDAVIT

WILLIAM HENNING RUBIN on oath deposes and says:

1. That he has read the foregoing Petition for Writ of Mandamus; and

2. That the statements made therein are true in substance and fact.

AFFIANT FURTHER SAITH NAUGHT.

/s/ WILLIAM HENNING RUBIN
William Henning Rubin
Attorney for Petitioners

SUBSCRIBED AND SWORM TO
before me this 7th day
of June, 1978.

Notary Public

TO THE SUPREME COURT OF ILLINOIS

BRIAN K. FLISK, and BRIAN K. FLISK, RECEIVER HOWARD WEITZMAN, and H.J. COLEMAN AND CO., INC., an Illinois corp., *Petitioners* *vs.* HONORABLE WILLIAM A. KELLY, Judge of the Circuit Court of Cook County, Municipal Division, *Respondent*	PETITION FOR WRIT OF MANDAMUS From the: CIRCUIT COURT OF COOK COUNTY, ILLINOIS, MUNICIPAL DIVISION, In Case Numbers: 78 M1-290379 78 M1-290380 78 M1-290381 78 M1-290382 78 M1-290383 and 78 M1-290384

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR MANDAMUS

TO DIRECT THE RESPONDENT TO ORDER THE RETURN OF THE GAS METERS TO PETITIONERS UPON DEPOSIT WITH THE SHERIFF OF COOK COUNTY OF A BOND OR CASH DEPOSIT TWICE THE AMOUNT OF THE VALUE OF THE METERS AS SET FORTH IN THE WRITS OF REPLEVIN.

PETITIONERS BRIAN K. FLISK and BRIAN K. FLISK, Receiver, HOWARD WEITZMAN, and H.J. COLEMAN & COMPANY, INC., an Illinois corporation, have filed this Petition for Writ of Mandamus to direct the respondent to order

the Sheriff of Cook County to return the meters illegally seized without the service of a writ of replevin, and the refusal of both the Sheriff and the Respondent to order the Sheriff to return the meters concurrently with the posting of a bond, or the deposit of cash twice the amount of the value of the meters as set forth in the writs of replevin.

An examination of the transcript of the exparte hearing held in chambers (a star chamber proceedings) clothed in complete secrecy as a result of counsel for Peoples Gas Light and Coke Company the Plaintiff in the Municipal Court cases for replevin advising the court that if it became known to the Defendants that the meters were being seized that they would be destroyed.

It is unbelievable but nevertheless true, that those statements were made by Counsel. The motions are under oath not of an official of the Gas Company but under the signature of Counsel who obviously never visited a basement and querry . . . if he even knows what a gas meter looks like.

A copy of the Transcript is attached to this Memorandum of Law.

In order for the Court to have in proper perspective the petition for mandamus it is necessary to examine the transcript hereinabove referred to.

The purpose of bringing the mandamus proceedings is to have this Court take jurisdiction and order the Respondent to conform to the series of decisions decided by the Supreme Court of the United States within the lat ten (10) years; and which in turn caused the amendment of the replevin laws in a number of states including that of the State of Illinois.

This occurred immediately following the rendering of the decision of the Supreme Court of the United States in the case entitled: *Fuentes v. Chevin,* (1972) 407 U.S.67, 32 L.Ed 2d 556, Rule 107 of the Rules of the Supreme Court of Illinois set forth in hoc verba the form of notice that shall be served upon the

Defendant in a replevin suit and further provides under Section (b) Service, the type of service, and that the notice of hearing shall be served not less than five days prior to the hearing in accordance with Sections 13.1 to 13.4 of the Civil Practice Act in the manner prescribed in Rule 284 (107) adopted effective September 1, 1974.

Section 4A of the present Illinois Replevin Statute specifically provides that five days elapse from the date of service of notice of hearing for the issuance of a writ of replevin.

Based on the false testimony and affidavits attached to the motions for the issuance of the writ of replevin without notice and without a bond to protect the defendants from the forcible entry, the court ordered the issuance of writs of replevin and these were delivered to the sheriff.

One sheriff together with the Chicago Policeman who according to the testimony were deputized as sheriffs seized the gas meters. Following the seizure one of the sheriffs served a "rent collector" in one of the real estate firms that was managing the property. In the case of the corporation, no notice was served following the removal on an officer or a registered agent of the corporation.

Defendant's Counsel filed an appearance and moved to dismiss the proceedings on the ground that no evidentiary hearing was held, only to have the Judge advise that there was a "star chambers proceedings" in chambers and that a copy of the transcript could be obtained from the court reporter upon the payment of a fee.

Immediately thereafter Counsel for Defendants obtained a copy of the transcript of testimony that was offered in chambers and proceeded to file a written motion to dismiss the replevin proceedings and to have the sheriff deliver the meters back to the respective buildings from which they were removed.

Prior to that the Sheriff was offered a bond pursuant to an oral motion made in Court and the Sheriff advised that he could not

return the meters since he had delivered them to the Plaintiff Peoples Gas Light & Coke Company.

It was then that the Counsel for Petitioners filed a written Motion to Dismiss the proceedings and to post a cash bond evidenced by money orders for twice the amount of the value of the meters as set forth in the writs of replevin.

The crux of Petitioners' contention is that the issuance of writs of replevin based on false testimony and affidavits that it was necessary to remove the meters to prevent the destruction and to turn them over to the States Attorney's office for criminal prosecution, is a complete misuse of judicial process.

That if the statements of Counsel for the Gas Company were true that the meters were sought for criminal prosecution those meters could have been taken based on a search warrant except that an official of the Gas Company would have been required to file an affidavit alleging specific facts which when found to be true would "pave the way" for a large damage suit against the Gas Company.

In order to eliminate this possibility, the Gas Company officials and their Counsel devised the switch to use a writ of replevin painting a picture of danger to the residents of the neighborhood, destruction of the gas meters, and other fantastic statements which the Respondent accepted as "gospel".

The language of the form of the Replevin Writ is especially called to the attention of this Court and contains the following language:

"To the Officer:
You are commanded if plaintiff gives you bond as required by law; take from the defendant and deliver to the plaintiff *unless the Defendant gives you bond* as required by law, the following property; One Roots Meter Series 125 LMA Model 5M 125, Meter No. 1674091 located at 5334 West Madison Street, Chicago, Illinois. You are to serve this writ

on each defendant and return it without delay." (Emphasis added)

That the Respondent specifically ignored the language of the Replevin Writ which grants the Defendants the right to retain the property that is being replevied upon the posting of bond with the sheriff.

That the Respondent was legally bound as was the sheriff to accept the bond from the defendant.

That the seizure without notice and without the service of the writ of replevin was a conspiracy to violate and eliminate the rights of the Defendants, the Petitioners herein.

That the protection of the rights of the Petitioners, the Defendants, was guaranteed by the following decisions of the Supreme Court of the United States and the Respondent is required to follow these decisions and cannot bypass those decisions irrespective of his personal feelings in the matter:

Snaidach v. Family Finance Corp. et al, (1969) 395 U.S.336; 23 L.Ed.2d 349; set the pattern concerning the legality of summary procedures authorizing prejudgment seizure of personal property.

That case determine that there had to be an adjudication of the rights of the parties before the property could physically be subject to the plaintiff's claim.

The decision in *Goldberg v. Kelly* (1970) 397 U.S.254, followed the Sniadach Case and it was held that procedural decisions under the Fourteenth Amendment required that welfare recipients be afforded an evidentiary hearing before a termination of benefits by welfare authorities."

In fact, the Court held that the "post termination hearing did not meet the due process requirements. In fact, it was the court's reasoning that the interest of an eligible recipient in uninterrupted receipt of public assistance coupled with the state's interest that its payments not be erroneously terminated outweighed the state's

countervailing interest in the preserving of fiscal and administrative resources."

It is interesting to note while the court held that the predetermination hearing in that case did not require a judicial or quasi judicial trial, it was required "that it meet minimal procedural safeguards demanded by rudimentary due process, which included affording the recipient the opportunity to confront and cross examine witnesses relied on by the Welfare Department, to retain an attorney, if he so desired, and to present oral evidence to an impartial decision-maker, whose conclusion must rest solely on the legal rules and evidence adduced at the hearing."

In *Fuentes v. Shevin* 407 U.S.67, 32 L.Ed.2d 556, the Supreme Court in the case made the specific point:

> "That the primary question in the replevin case is whether the state's statutes are constitutionally defective in failing to provide for a hearing at a meaningful time . . ."

In Florida, the replevin statute guaranteed an opportunity for a hearing after the seizure and in Pennsylvania the statute permitted a post seizure hearing *provided the aggrieved party shouldered the responsibility and burden of initiating it.*

The Supreme Court specifically found in the Fuentes Case that the replevin statute of both the State of Florida and the State of Pennsylvania were unconstitutional.

> The paramount question before the Supreme Court is: *Whether procedural due process in the context of the case cited requires an opportunity for hearing before the state authorizes its agents to seize the property in the possession of a defendant upon application of another.*

The Supreme Court decisions all subscribe to the contention that:

The Constitutional right to be heard is a basic aspect of the duty of government, to follow a fair process of decision making when it

acts to deprive a person of his possessions.

The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose more particularly is to protect his use and possession of the property from arbitrary encroachment, to minimize substantive unfair or mistaken deprivation to property, a danger that is especially a great one when the state seizes goods simply upon the application of them for the benefit of a private party. So viewed, the provision against the deprivation of property without due process of law, reflects the high value embedded in our constitutional and political history to be placed on a person's right to enjoy what is his, free of governmental interference. See: *Lynch vs. Household Finance* 405 U.S.538, 552; 31 L.Ed.424, 435; 92 Sup.Ct. 1113.

It has long been recognized that fairness can rarely be obtained by secret-one-sided determination of fact decisive of rights; and no better instrument has been devised in arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.

Joint Anti-Fascist Refuge Committee vs. McGrath, 341 U.S.123, 17—172; 95 L.Ed.817, 853; 854; 71 Sup.Ct.624 (Frankfurter, J. concurring).

> "If the right to notice and a hearing is to serve its full purpose then it is clear it must be granted at a time when the deprivation can still be prevented. At a later hearing an individual's possessions *can be returned to him if they were unfairly or mistakenly taken in the first place.* Damages may even be awarded him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred; this court has no embraced the general proposition that a wrong may be done so that it can be, if it can be undone. *Stanley v. Williams,* 405 U.S.645,647; 31 L.Ed.2d551, 556; 92 Sup.Ct.1208.

The court further said; there is no new principle of

constitutional law; the right to prior hearing has long been recognized by this Court under the 14th and 15th Amendments. Although the court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case.

See *Lain vs. Central Hanover Trust Company*, 339 U.S.336; 94 L.Ed.865, 872; 70 Sup.Ct.652, "and depending upon the importance of the interests involved, and the nature of the subsequent proceedings if any."

The court permitted *erroneously* a police officer who had never seen the inside of the basement, had never looked at the meter, touched the meter, examined the meter, to say that he was delegated from the Chicago Police Department and assigned to the Peoples Gas Light & Coke Company to check on gas meters to see if there was any unmetered gas.

If counsel for defendant was present he would have moved immediately that such garbage be striken, since that testimony is worthless.

He had no knowledge of the meters involved; he had no knowledge of the premises; and there was no point in putting on that kind of testimony.

To compound the errors, the Court made a statement in the record that he heard of gas being diverted by the use of rubber pipes. There was not one iota of testimony that any pipes had been changed or any other violation had occurred.

The only statement we have is that of counsel that the meters are going to be turned over to the States Attorney for criminal action.

There was no testimony that there was any criminal action and there is no basis for using a civil writ to obtain a gas meter which could not be obtained by virtue of a search warrant.

The further statement of Court in *Fuentes v. Shevin*, is most important due to the fact that there was no notice or hearing

where both sides are present. I quote the specific language of the court:

> "Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly confinced that his view of the facts and law will prevail, and therefore, quite willing to risk the cost of litigation. Because of the understandable self-interest fallibility of litigants, the Court does not decide a dispute until it has had an opportunity to hear both sides—does not itself take over tentative action until it has itself examined the support for the plaintiff's position."

The Florida and Pennsylvania statutes do not even require the official issuing of a writ of replevin to do that much. "The minimal deterrent effect of a bond requirement is in practical sense no substitute for an informed evaluation by neutral official."

> "More specifically, as a matter of constitutional principle, it is no replacement for the right to require hearing that is the only true, effective safeguard against the arbitrary deprivation of property; while existence of these other less effective safeguards may be amont the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to acquire a prior hearing of some kind."

That this Court's attention is specifically called to *Camara v. Municipal Court of the City of San Francisco*, 387 U.S.523, 18 L.Ed.2d 930.

In this case, the Defendant while awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit plaintiff inspectors to inspect his residence without a warrant, the defendant brought an action for a writ of prohibition to be issued to the Criminal Court alleging that the ordinance authorizing such an inspection was unconstitutional on its face. The Superior Court of Cleveland denied the writ; the District Court of Appeals affirmed; and the Supreme Court of California denied the petition for a rehearing.

On appeal the Supreme Court of the United States vacated the judgment and held:

> "That under the Fourth Amendment the Defendant had a constitutional right to insist that the inspectors obtain a warrant to search and that he may not constitutionally be convicted for refusal to consent to the inspection."

The facts in that case are very important in shedding light on the case at bar. In the Camara Case, Camara filed that question in the California Superior court that he was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence and that a writ or prohibition should issue to the criminal court because the ordinance authorizing such inspection is unconstitutional on its face.

The Superior Court denied the writ; the District Court of Appeals affirmed, and the Supreme Court of california denied a petition for rehearing. The appellant in that case presented the constitutional questions to the Supreme Court of the United States.

In the Camara Case, the building manager informed the Building Inspector that Camara was using the rear of the building as a personal residence and that the occupancy permit did not allow residential use of the ground floor.

The Inspector demanded that Camara permit the inspection of the premises. Camera refused because the inspector did not have a search warrant. The inspectors insisted that by law Camara was required to permit the inspection. A Complaint was then filed charging Camara with refusing to permit a lawful inspection and he was arrested and released on fail. When his demurrer to the criminal complaint was denied Camara filed a petition for a writ of prohibition. Camara argued that the building inspection law violated the Fourth and Fourteenth Amendments to the Constitution and that it authorized municipal officials to enter a

private dwelling without a search warrant and without probable cause.

The Supreme Court in the Camara Case reconfirms that the right of people to be secure cannot be violated and that before a search can be permitted a search warrant must issue. The court said:

> "The Fourth Amendment provides that, 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.' *Wolf v. Colorado*, 338 U.S.25,27, 93 L.Ed. 1782, 69 S.Ct.1359. As such, the Fourth Amendment is enforceable against the States through the Fourteenth Amendment. *Ker V. California*, 374 U.S.23,30, 10 L.Ed.2d 726, 735, 83 S.Ct. 1623."

It is quite obvious that Plaintiff Gas Company could not obtain a search warrant, that it resorted to a writ of replevin that it conspired with the sheriff and the Gas Company conspiring to evade the requirements of the Replevin Act, and that the Respondent was the "willing victim" of Peoples Gas Light and Coke Company and was erroneously led to believe that danger existed, that criminal acts were being performed and all of this was based on a false affidavit of counsel who had never visited a single building and had no independent knowledge of the equipment of the plaintiff Gas Company, its value, and whether there was any possibility of its being destroyed as alleged by the Counsel for Plaintiff.

It is therefore urged upon this Court that the writ of mandamus issue directing the respondent to conform to the decisions of the United States Supreme Court; that an order be entered directing the Respondent to issue an order directing the Sheriff of Cook County to obtain the meters illegally seized from the premises of the Defendants and turned over to the Plaintiffs concurrently with their posting of a bond with surety or cash twice the amount of the value of the meters that were seized from Petitioners' premises.

Respectfully submitted,

BRIAN FLISK, and
BRIAN FLISK, RECEIVER,
HOWARD WEITZMAN, and
H.J. COLEMAN AND COMPANY, INC.,
an Illinois corporation
PETITIONERS

/s/ WILLIAM HENNING RUBIN
William Henning Rubin
Their attorney

Law Offices of:

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60601
263-6780

VERSUS:	CASE NUMBER
BRIAN K. FLISK	78 MI-290382
BRIAN K. FLISK, Receiver	78 MI-290381
H.J. COLEMAN & COMPANY	78 MI-290380
HOWARD WEITZMAN	78 MI-290379

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

PEOPLES GAS LIGHT &
COKE COMPANY,
Plaintiff

vs.

*see above

Defendent

78 M1-2903____

MOTION TO DISMISS THE REPLEVIN PROCEEDINGS

AND RETURN SEIZED PROPERTY, ILLEGALLY OBTAINED UNDER THE SUBTERFUGE OF A REPLEVIN SUIT UPON THE POSTING OF A BOND IN ACCORDANCE WITH THE PROVISIONS OF THE REPLEVIN STATUTE.

NOW COMES DEFENDANT (see above)
and Moves the Court as follows:

That the Sheriff of Cook County, contrary to the provisions of the Replevin Statute did not make a demand on the Defendant in this cause for the posting of a bond or cash in the amount set forth in the Complaint for Replevin, prior to the removal of the property.

This motion filed in each of the above cases.

That the property delivered to Plaintiff Peoples Gas Light & Coke Company by the Sheriff of Cook County under false pretenses be returned to the Defendant concurrently with the posting of a bond twice the amount of the value set forth in the Complaint for Replevin in accordance with the Replevin Statute.

THAT In Support of this Motion Defendant says as follows:

1. That the Sheriff of Cook County, contrary to the provisions of the Replevin Statute did not make a demand on the Defendant in this cause for the posting of a bond or cash in the amount set forth in the Complaint for Replevin, before or prior to the removal of the property.

2. That Defendant's Counsel has just obtained from the Court Reporting firm of Wolfe, Rosenberg and Associates a copy of the Transcript of Proceedings held on the 16th day of May, 1978, in the chambers of the Honorable William Austin Kelly.

3. That said transcript reflects that witnesses were produced by Plaintiff who gave false testimony for the express purpose of attempting to convince the Honorable William Austin Kelly that the matter of replevin was an emergency, that life was being endangered, and that there was a criminal investigation in process.

4. That all of these statements are completely false and untrue.

5. That plaintiff produced Tony DeLucio as a witness at the hearing held on May 16, 1978 in the chambers of the Honorable William Austin Kelly.

6. That witness DeLucio was interrogated as to whether or not the meter and the gas piping was the property of the Plaintiff. (Transcript page 11)

7. The answer was: "It is."

8. That statement is completely false and untrue since all of the piping belongs to the owner of the property and is not the property of the gas company.

9. That the following question was propounded to Tony DeLucio (TR. P. 12):

Q: Now, with respect to these various service locations, did you, pursuant to Commerce Commission Regulations, serve final notices and disconnect notices on those owners?

A: Yes, we did.

Q: Did you also serve them on Mr. Flisk and the corporation of H.J. Coleman Company and B. Coleman Corporation?

A: Yes.

Q: And what response did you receive from Mr. Flisk on those occasions?

A: Continual refusal to gain us access to remove meters.

Q: Has any attempt been made at prior times to gain access to the various premises involved here for the purposes of reading or repairing meters or servicing these accounts?

A: We attempted at many occasions to gain access.

Q: And have you ever been allowed access into these premises?

A: Occasionally through a Court Order we were allowed access to read the meters.

10. That statement is completely false. And, pursuant to an agreement with the Gas Company gas meters of buildings located on the West Side of Chicago are read on the second Tuesday of each and every month; gas meters on the South Side are read on the Third Tuesday of each and every month.

11. That Counsel for Plaintiff continued, posing leading questions (Since there was no one to object; it was an *ex parte* hearing) powed the question:

Q: Isn't it a Commerce Commission ruling, and policy of the

Gas Company that meters be exchanged or switched periodically for the safety of the customers?

A: That's correct.

The next question posed to Mr. DeLucio was:

Q: And is that the reason that the meter is due for a change in that location?

A: The main reason we want to remove the meter or change the meter at that location is our suspicion of possible tampering (sic) with the meter itself.

Q: Now, is this the basis for the removal of the meters at the other locations in addition to the fact that the gas service is ongoing and you have been refused entry for the purpose of reading the meters and making an investigation of your property?

A: In addition to the gas bills owing at these different locations, it's also the suspicion of the tampering of the gas meters themselves.

12. That this testimony was given for the express purpose of trying to convince the Court that there was a dangerous condition existing in this building and the other buildings involved in these proceedings which is further completely false and untrue.

13. That the Court then posed a question:

THE COURT: Let me ask one further question: Is it a fact that a 'ampered meter is really a risk to human life in a community?

And the witness responded to the Judge's statement and said:

A: THE WITNESS: Well, it it's done by—obviously it would be done by unauthorized persons; how well they are qualified to do something, there is no way for me to know. Myself, based on my experience, I would say it's a dangerous condition.

14. That the Court became so misled by the statements of the gas employee that the Court said:

THE COURT: Isn't it true that there have been several instances of meters being bipassed with rubber hoses resulting in explosion of those buildings?

And the witness affirmed the statement of the Court by saying:

THE WITNESS: Yes, that's correct.

15. That confirmation that the biased testimony was being used to convince the Court of the necessity of the removal of the meters and that the testimony was having its effect on the Court . . . is the following statement:

THE COURT: The Court wants to take that into consideration on protecting human life. That would be my reason of issuing a Writ of Replevin here, and I want your expert testimony in that area, not the Court's recollection of it.

Can you tell me something about the risk to human life that is involved here? Do you know of instances where tampered meters have resulted in explosions?

16. That the Court was being further impressed and assuming that the testimony of Tony DeLucio was being offered in good faith, said:

THE COURT: The Court would imagine that this is the reason—one of the reasons why the Commerce Commission has permitted this rule to be in effect; you can change the meters because they feel they are protecting life and property. And the Court, even though it hasn't been brought out, will consider that.

Proceed.

17. That Counsel for Plaintiff, realizing that the testimony was a complete fabrication then posed a question:

Q: And isn't it true that while they have agreed to allow the Company access to the premises, reading their meters, they refuse to allow you to replace or remove the meters?

A: That's correct.

18. That no documentary evidence was produced or offered that a demand for the replacement of meters was made upon the Defendant in this cause and was refused.

19. That no such order was issued by the Commission and furthermore those cases in which the Commission denied the petitions of the defendants are on appeal in the Circuit Court of Cook County and are pending before the Honorable Arthur Dunne.

20. That Plaintiff's Counsel at no time at the hearing made any mention to the Court that the cases before the Commerce Commission were appealed to the Circuit Court and the Appellate Court of Illinois.

21. That Counsel for Plaintiff prepared a synopsis of these cases pending before the Commerce Commission but that synopsis again does not relate to any cases on file.

22. That Counsel for plaintiff further used a communication to the Gas Company advising them not to make any illegal entry, the reason being that the properties are located in the high crime area and the basements cannot be left open as a subterfuge to seize the meters.

23. Plaintiffs must admit, and Defendant is filing a request for admissions to confirm this, that each and every meter for which a replevin suit was filed was read within the last thirty days, which further confirms that Plaintiffs' intentions herein were not for the purpose of retrieving the meters but only for the purpose of bypassing the rules and regulations of the Commerce Commission. The Plaintiffs are using the replevin statute in lieu of a search warrant since they could not obtain one of those—since there was no probable cause. The purpose in this instance

was only to seize the meters since no order was obtained from the Commission for the removal of the meters plus the fact that not a single meter has been in any one of the buildings for over a period of three years.

24. That the plaintiff in this cause has employed the Police Department, the Sheriff's Department imposed on the Court in violation of the Civil Rights of the Defendants and has caused this Court to issue an order in violation of the Civil Rights of the Defendant without due process, and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

25. That by creating a hoax of meter tampering the tenants of the various properties owned by the Defendants have been deprived of heat and hot water.

26. That in the case of one of the buildings the tenants have been deprived of cooking gas.

27. In the instant cases the meters had been changed, examined and replaced, within a period of approximately three years whereas in many buildings in the City of Chicago the meters had not been changed in more than a period of 20 years, which more than confirms the fabrication and the lies that were presented before this Court.

28. That the outlandishness of the fabrication that was woven by Plaintiff's Counsel is further confirmed by his interrogation of Officer Ernest Ursitti (TR May 16, 1978; P. 26:1.5)

Q: And with respect to the meters that the company seeks to replevin at this time, should the court issue this order, these meters are, to the best of your knowledge, involved in the tampering by Mr. Flisk.

A: Yes, sir, they are.

(At Page 26, line 17:)
Q: Have you made any investigation of these particular buildings from the inside at all?

A: No, sir.

Q: Have you ever been allowed in these buildings?

A: We have never tried to gain access.

29. *The officers specifically stated that he had not been in the building and yet Counsel for the Plaintiff has the audacity to put this police officer on the stand to say he is making an investigation.*

30. At the end of that "type of garbage" as testimonyh this Court is then requested by Counsel: (P.26,l:22 ff)

MR. WEXLER: Judge, I have no further questions of the officer at this time.

Excuse me, one more question.

BY MR. WEXLER:
Q: Have you made any investigations of these particular buildings from the inside at all?

A: No, sir.

Q: Have you ever been allowed in these buildings?

A: We have never tried to gain access.

MR. WEXLER: Judge, at this time I would move that the plaintiff be granted a Writ of Replevin to take possession of the various meters involved in these locations, subject to the fact that these meters, once they are taken, are going to be turned over to the possession of the police department investigative unit along with the gas company for the purposes of criminal prosecution of these individuals.

I think that we have shown a prima facie case; that the defendant has forcibly and willfully refused to allow the gas company the right to repair, alter, change, read, or remove and terminate service at these various locations where the gas company has, in fact, followed "all the statutory requirements imposed upon them by the Commerce

Commission of the State of Illinois, and I think that they are entitled to an order at this time to take possession of these properties and use whatever reasonable force is necessary to gain access into these premises.

"I might add, for the purposes of the record, that the Police Department will have a unit, tactical unit, with Officer Ursitti and his partner on duty during the course of these removals should there be any problem arising, and along with the Deputy Sheriff of Cook County, Illinois, who will be present at the time the meter will be removed, should there be any problems with the Department."

31. This type of presentation further confirms that the Plaintiff Peoples Gas Company and its officers and Counsel were engaged in a conspiracy to deprive the Defendants of the use of the gas contrary to the Rules of the Illinois Commerce Commission, and in violation of due process as well as Defendant's Civil Rights.

32. That the relief that Plaintiff sought cannot be obtained under a writ of replevin and on the other hand a writ of replevin cannot be used as a subterfuge to defeat defendant's right that were granted to him pursuant to the Illinois Utilities Act which gives the Illinois Commerce Commission the sole discretion with the right of review before the Circuit Court of Cook County.

33. That since the transcript reflects that the purpose of the seizing of the meters under the pretense of replevin was only for the purpose of investigation, Defendant demands that the meters be tested by the Department of Weights and Measures of the City of Chicago in the presence of a representative of the Defendant, or in the alternative that a testing company be designated to test the meters for accuracy, and a report be made to the litigants.

34. That the Plaintiff must seek its relief in the cases presently pending in the Circuit Court of Cook County; or in the alternative conform to the Rules of the Illinois Commerce Commission which require that if the Plaintiff in good faith seeks the replacement of a meter it must state without question what defect,

it any, there exists in the meter, the date of the installation of the meter, and the reason for changing the meter.

WHEREFORE, DEFENDANT MOVES That:

1. The gas meters be restored to the premises concurrently with the posting of a bond twice the amount of the value of the meter;

2. Or, in the alternative that new meters be installed pending the determination of the accuracy of the meters;

3. That the Court find that it has no jurisdiction to determine the validity of any gas bills that have been rendered against any properties involved in these proceedings;

4. That this Court order and direct the City of Chicago Department of Weights and Measures to examine the meters for accuracy and to report back to the litigants.

5. That this Court find that the Plaintiff has abused the legal process of using the replevin statute as a means of obtaining purported evidence for a criminal investigation without due process of law and in violation of the civil rights of the Defendant.

6. That the Court grant Defendants such further relief as it may deem proper.

/s/ WILLIAM HENNING RUBIN
William Henning Rubin

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60601
263-6780

AFFIDAVIT

WILLIAM HENNING RUBIN being on oath duly sworn deposes and says:

1. That he is the attorney for Defendants in this matter;

2. That he has thoroughly examined the Transcript of the proceedings held on the 16th day of May, 1978, which was prepared by the Court Reporting firm of: Wolfe, Rosenberg, et al;

3. That the allegations made in this cause concerning excerpts of the Transcript are the result of his thorough examination of that Transcript and have been inserted in this Motion for the consideration of the Court in rendering a decision on the merits of the Defendant's Motion to Dismiss these proceedings.

AFFIANT FURTHER SAITH NAUGHT.

/s/ WILLIAM HENNING RUBIN
William Henning Rubin

SUBSCRIBED AND SWORN TO
before me this _____ day
of May, 1978.

_____
Notary Public

Number: 77L-24563

APPEAL TO THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
FROM THE ILLINOIS COMMERCE COMMISSION

B. COLEMAN CORP. and BRIAN FLISK *Complainants,* *vs.* PEOPLES GAS LIGHT AND COKE CO., *Respondant*	On appeal from the Illinois Commerce Commission of the State of Illinois Docket No. 78-0186 Complaint as to alleged failure to read meter, demand for deposit, and threatened discontinuance of service at: 6755 S. Ridgeland (Acct 681898-4201 and Acct No. 681898-3101;) at 6801 S. Cornell Ave. (Acct. Number 165763-10302); at 1509 E. 69 Place (Acct. No. 948148-35601); etc.

NOTICE OF APPEAL

To:

Arthur S. Kallow, Esq. &
Eli Helou, Esq.
Peoples Gas Light & Coke Co.
Law Department
122 South Michigan Avenue
Chicago, Illinois

William J. Scott, Esq.
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois

COMPLAINANTS B. COLEMAN CORPORATION and BRIAN FLISK, hereby appeal to the Circuit Court of Cook County of the State of Illinois pursuant to Chapter 111-2/3 Section 72 of the Statutes of the State of Illinois (Smith-Hurd Edition) from the following orders, entered by the Illinois Commerce Commission on the 12th of October, 1977 and from the order entered on the 22nd of November, 1977 which was certified by Rose M. Claggett, Acting Secretary on the 28th of November, 1977, denying Complainants-Petitioners' complaint and denying Complainants' petition for a rehearing.

Complainants (Petitioners) specifically appeal from the following findings:

1. The Peoples Gas Light and Coke Company, an Illinois corporation having its principal office in Chicago, Illinois, is engaged in the business of purchasing, producing, storing, distributing and selling gas within the City of Chicago, Illinois, and as such is a public utility within the meaning of an Act entitled, "An Act concerning public utilities," as amended.

2. Complainant is a customer of Respondent at the following addresses in the City of Chicago, Illinois:

- 6755 South Ridgeland and	Acct. No. 681898-4201 681898-3101
- 6801 South Cornell Ave.	Acct. No. 165763-10302
- 1509 East 69th Place	Acct. No. 948148-35601
- 8001 South Dobson	Acct. No. 199688-5001
- 8003 South Dobson	Acct. No. 199691-20501
- 43 East 110th Street	Acct. No. 989875-33401
- 11000 S. Michigan Ave.	Acct. No. 543489-17701
- 11000 S. Michigan Ave.	Acct. No. 543489-22101
- 4743 South Drexel	Acct. No. 207427-4
- 4743 South Drexel	Acct. No. 207427-10101
- 4220 South Michigan	Acct. No. 541687-10201
- 5440 West Madison	Acct. No. 495168-2501

- 4950 Vincennes Act. No. 799789-3089
- 1553 W. 94th Street Acct. No. 98074-3301

3. the Commission has jurisdiction over the parties and the subject matter of this proceeding;

4. the recitals of fact set forth in the prefatory portion of this order are amply supported by evidence in the record, and are hereby adopted as findings of fact herein;

5. Payment to a utility cannot be withheld merely because bills are issued based upon estimated meter readings in accordance with Respondent's tariffs on file with the Commission and applicable General Orders of the Commission unless it can be shown that utility services were not consumed;

6. Estimated bills rendered by Respondent were due to the inability of Respondent's meter readers to gain access to portions of Complainants' premises where the meters are located;

7. Estimated meter readings were in line with actual readings which were taken subsequent to the estimated readings; in those instances where estimated readings exceeded a later actual readings, bills based on the estimated readings were cancelled, and bills based on the actual readings were rendered.

8. Complainants' claim that they do not have to pay bills based on estimated meter readings should be denied;

9. Respondent acted and computed its bills in accordance with its tariffs now on file with the Commission and presently in effect, the Illinois Public Utilities Act, and the rules and regulations of the Commission;

10. As of October 8, 1976, there is due and owing Respondent by and from Complainants the sum of $18,236.98 for gas services rendered at these premises and $16.920 for deposits assessed by Respondent to secure the payment

thereof, which amounts have been computed in accordance with Respondent's tariffs now on file with this Commission and presently in effect, and its General Order 172, Revised:

11. The Complainants have failed to sustain the Complaint herein and said complaint should be denied.

B. COMPLAINANTS FURTHER APPEAL From the order denying the Petition for Rehearing.

WHEREFORE, COMPLAINANTS PRAY That said orders be reversed.

THAT THE CAUSE BE REMANDED to the Illinois Commerce Commission for rehearing with instructions to receive the testimony offered and refused:

B. COLEMAN CORPORATION and
BRIAN FLISK, Complainants-Petitioners

/s/ WILLIAM HENNING RUBIN,
Their attorney

Law offices of:

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60602
263-6780

No. 77L-17441

APPEAL TO THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
FROM THE ILLINOIS COMMERCE COMMISSION

HOWARD WEITZMAN, vs. PEOPLES GAS LIGHT AND COKE COMPANY Complainant as to demand for deposit and threatened discontinuance of service at 5007-13 King Drive, Chicago, Illinois	On Appeal from the Illinois Commerce Commission of the State of Illinois Docket No. 76-0182

NOTICE OF APPEAL

COMPLAINANT HOWARD WEITZMAN hereby appeals to the Circuit Court of Cook County, Illinois pursuant to Chapter 111-2/3 Section 72 of the Statutes of the State of Illinois (Smith-Hurd Edition) from the following orders: by the Illinois Commerce Commission:

1. From each and every order or part of the Order dated July 13, 1977 denying Complainant any relief;

2. Complainant further appeals from the order dated August 24, 1977 denying complainant's petition for a rehearing;

3. Complainant further appeals from the order of the Commission denying approval of his applications for subpoena duces tecum for the production of documents and certain witnesses, employees of Respondent to give oral testimony before the Commission.

WHEREFORE, Complainant prays that said orders be reversed; that the cause be remanded to the Illinois Commerce Commission for rehearing with instructions to receive the oral and documentary evidence offered by Complainant's expert witnesses and rejected.

COMPLAINANT FURTHER PRAYS That he may have such further relief as the Court may deem proper.

HOWARD WEITZMAN, Complainant

/s/ WILLIAM HENNING RUBIN
William Henning Rubin,
His Attorney

Law Offices of:

WILLIAM HENNING RUBIN
188 W. Randolph - 714
Chicago, Illinois 60602
263-6780